In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-98
JOHN MICHAEL DONNER, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5106
CONNIE GRUBBS MCNAMARA, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5119
PAUL JOSEPH MACK, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5120
ROBERT MARTIN MCNAMARA, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5121
JAMES DAVID WILLIAMS, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5138
JANE ANNE KENNEDY, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, in various combinations, contend: (1) that their convictions under constitutional statutes may have been irreparably tainted by the submission to the jury of a count charging a violation of a statute later held unconstitutional; (2) that statements made during a press conference were inadmissible because they postdated all other overt acts of the conspiracy and did not show specific intent sufficient to inculpate the participants; (3) that the prosecutor made improper remarks; and (4) that trial counsel's performance was inadequate representation of petitioner Mack.

After a jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted of one count (Count 1) of conspiring, in violation of 18 U.S.C. 371, to destroy public records, in violation of 18 U.S.C. 2071, to interfere with the administration of the Military Selective Service Act in violation of 50 U.S.C. App. 462(a), and of three counts (Counts 2, 3 and 4) of violations of 18 U.S.C. 1361, and 2071 and 50 U.S.C. App. 462(a), respectively. Each was sentenced to concurrent terms of four years' imprisonment on Counts 1, 3 and 4 and fined $5,000 on Count 2. The court of appeals reversed the Count 4 convictions for the Section 462(a) substantive count, but otherwise affirmed (497 F. 2d 184; Pet. App. A).[1] A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 10, 1974. The petitions for writs of certiorari in Nos. 74-98 and 74-5106 were filed on August 9, 1974; the petitions in Nos. 74-5119, 74-5120 and 74-5121 were filed on August 12, 1974; the petition in No. 74-5138 was filed on August 13, 1974. The latter four petitions are therefore out of time under Rule 22(2) of the Rules of this Court. In any event these cases do not warrant plenary review.

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[1]"Pet. App." refers to the appendix in No. 74-98.

The evidence showed that the Marion County, Indiana, office of the Selective Service System was vandalized by individuals who extensively destroyed records. A statement affixed to the office door identified the perpetrators as the "Beaver 55." Three weeks later petitioners held a news conference at which a statement signed by each was distributed and read aloud; in the statement petitioners identified themselves as the "Beaver 55" and claimed responsibility for the vandalism.[2] During the ensuing question period all petitioners except Connie Grubbs McNamara (petitioner in No. 74-5106) answered questions or volunteered statements (see Pet. App. A, pp. 3a-6a).

1. The court of appeals reversed petitioners' convictions on Count 4, the substantive count under Section 462(a), because *United States* v. *Baranski*, 484 F. 2d 556 (C.A. 7), had held the prohibition against hindering or interfering with the administration of the Selective Service Act "by force or violence or otherwise" unconstitutional; "or otherwise" included protected speech and conduct (see Pet. App. A, pp. 9a-10a). The panel below held that *Baranski* did not require reversal of the conspiracy count in this case, however, because that count charged a conspiracy to violate Section 2071 as well as Section 462(a) and petitioners, unlike the defendants in *Baranski*, were convicted of substantive violations of

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[2]Two other individuals signed the statement and participated in the press conference. They were tried and convicted with petitioners. One has since died and the other is a fugitive.

the constitutional statute (Pet. App. A, pp. 7a-9a). The court consequently thought it evident that petitioners' conviction on the conspiracy count rested on a finding by the jury that the conspirators had engaged in the overt acts that also supported the affirmed substantive conviction. Petitioners urge in various ways that their convictions nevertheless were infected by the submission of Count 4 to the jury.

(a) The trial court's instructions permitted the jury to find that the press conference was part of a continuing conspiracy—which had among its purposes propaganda and incitement—to violate Section 462(a). Petitioners therefore contend that *Baranski* compels reversal of the conspiracy count because they may have been convicted on the basis of an unconstitutional statute. We believe this argument was answered adequately by that portion of the court of appeals' opinion summarized (Pet. App. A, pp. 7a-10a).

(b) Petitioners nevertheless urge that *Street* v. *New York*, 394 U.S. 576, 578, and *Stromberg* v. *California*, 283 U.S. 359, require reversal because any conspiracy entailing both unlawful and protected acts creates the possibility that the jury may have convicted solely on the protected speech and conduct. Unlike petitioners' contention based on *Baranski*, which struck down Section 462(a) on its face, this line of argument requires the Court to agree that petitioners engaged in protected speech. We submit that petitioners' press conference was not "protected" speech but was a confession to past acts of criminal vandalism. A confession does not become protected because interwoven with a political justification of the crime and with advocacy of future acts of vandalism. The cases cited by petitioners deal with abstract calls

to political change; they are inapplicable to confessions of concrete criminal acts, and to the advocacy of additional acts similar to the vandalism to which petitioners confessed at their press conference. Cf. *United States* v. *Spock*, 416 F. 2d 165, 171 (C.A. 1) (First Amendment does not protect statements calling for commission of a specific crime). Because the utterances were not protected, the jury was permitted to consider them for whatever relevance they may have had to the substantive counts, and for what they may have shown about the intent of the conspirators and the scope of agreement under the conspiracy count.

(c) Petitioners' contention that a *Pinkerton* charge —permitting the jurors to attribute certain overt acts of one conspirator to another for purposes of the substantive offenses—allowed improper cross-use of evidence on the various counts, or alternatively that *Pinkerton* v. *United States*, 328 U.S. 640, 647-648, was disregarded by the courts below (Donner Pet. No. 74-98; compare p. 13 with pp. 14-15), is not persuasive. No *Pinkerton* charge was given. See Pet. App. A, pp. 12a-15a. The jury could have used the evidence for improper purposes, or against defendants whom it did not concern, only if it ignored the district court's careful limiting instructions.

2. Petitioners also argue that, under the *strictissimi juris* rule enunciated in *Spock* (see 416 F. 2d at 172-173, 178-179), their attendance at the press conference and joint signing of the prepared statement read and distributed at that conference were insufficient to establish their specific intent to adhere to the criminal purposes of the conspiracy. This argument is inapplicable to the instant case. Petitioners Connie Grubbs McNamara (who was silent at the press

conference) and Mack made extrajudicial statements admitting actual participation in the incursion into the Selective Service office (see McNamara Pet. No. 74-5106 at 4, 13, n. 3; Pet. App. A, p. 15a (Mack)). Petitioner Connie Grubbs McNamara's statement that she had participated in a "draft action in Indiana" was an admission of specific conduct[3] and not a "generalization" such as the one by a defendant in *Spock* that he would "do 'anything' asked to further opposition to the war." 416 F. 2d at 178.

In any event, the specific intent of each petitioner was sufficiently established by the signed, prepared statement and by the appearance at the press conference. The prepared statement did not, like the "Call to Resist Illegitimate Authority" in *Spock*, merely express approval and moral support for unlawful actions undertaken by others, 416 F. 2d at 174, so that signing it would not necessarily show the commission of criminal acts. The statement in this case identified its signers as the "Beaver 55," the perpetrators of a specific act, and "claimed responsibility" for the vandalism, which was offered as an example for others to follow.

Signing the statement also demonstrated an intent to adhere to the statement's advocacy of imitative acts of vandalism by others. It is not significant that two of the signers were silent at the press conference. Presence, as a signatory and as one of the sponsors of the conference, was sufficient evidence of adherence to the plan.

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[3]The credibility of the witness reporting the statement was a matter for the jury to determine.

3. Petitioner Connie Grubbs McNamara contends (Pet. No. 74-5106, p. 18) that the prosecutor should not have argued to the jurors that if they accepted defense counsel's theory of the case they would be "joining the conspiracy; he is asking you to join the conspiracy of the Beaver 55." The prosecutor's language may have been an oratorical excess, but it did not deprive petitioners of a fair trial. The prosecutor's remarks cannot be read as a threat to indict or otherwise punish the jurors if they returned a verdict of not guilty, nor were the jurors threatened with the opprobrium of their neighbors, as in *Lowdon* v. *United States*, 149 Fed. 673, 678 (C.A. 5). Nor did the prosecutor seek to "arouse passion and prejudice" against petitioners by a "wholly irrelevant" appeal to wartime sentiments, as in *Viereck* v. *United States*, 318 U.S. 236, 247-248.

4. Petitioner Mack claims that he was denied the effective assistance of counsel because, he asserts, the lead trial counsel who jointly represented all petitioners adopted trial tactics which were favorable to his co-defendants but injurious to him. However, this is not a case like *Glasser* v. *United States*, 315 U.S. 60, in which a defendant against whom the case was not a strong one objected to the appointment of his retained counsel to represent a co-defendant. All defendants, including petitioner Mack, initially had retained two local attorneys to represent them jointly; the lead attorney, from out of state, appeared on the first day of trial and told the court that he would represent petitioner as well as the other defendants. The trial judge then interrogated petitioner, who stated that he wished the attorney to represent him, that he had conferred and had sufficient consultation

with the attorney, and that he was ready for trial and did not want a continuance. Having voluntarily chosen joint representation, petitioner cannot now claim that it was prejudicial to him.

Moreover, petitioner Mack has not demonstrated a conflict of interest between himself and his co-defendants. He was the apparent leader of the group and chaired the press conference and read the prepared statement. He was not implicated by a co-defendant's confession, as in *Sawyer* v. *Brough*, 358 F. 2d 70 (C.A. 4); and he implicated himself by a statement he made on a radio talk show (see Pet. App. A, p. 15a). Although petitioner Mack now contends that his counsel's conduct was one of "harassment and ridicule" as to him (Pet. No. 74-5119, p. 2), the court of appeals found, after examination of the record, that the disparaging remarks were made only in bench colloquies out of the presence of the jury and that they amounted to "honesty and forthright recognition of clearly established facts" which "may well as a matter of trial strategy provide a better defense than a dissimulative distortion of that which is patent and virtually beyond argument" (Pet. App. A, pp. 18a-19a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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